

IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

DEWAYNE CEDRIC LEE SHIRLEY,)

Appellant,)

v.)

THE STATE OF OKLAHOMA,)

Appellee.)

NOT FOR PUBLICATION

Case No. F 2003-442

FILED
IN COURT OF CRIMINAL APPEALS
STATE OF OKLAHOMA

JUN 24 2004

SUMMARY OPINION

MICHAEL S. RICHIE
CLERK

JOHNSON, PRESIDING JUDGE:

Appellant, Dewayne Cedric Lee Shirley, was convicted by a jury in Oklahoma County District Court, Case No. CF 2000-6468, for the crimes of Conspiracy to Commit Robbery (Counts 1 and 3), in violation of 21 O.S.1991, § 421, First Degree Murder (Count 2), in violation of 21 O.S.1991, § 701.7(B), Robbery with a Dangerous Weapon (Count 4), in violation of 21 O.S.1991, § 801, and Possession of a Firearm by Convicted Felon (Counts 6 and 8), in violation of 21 O.S.1991, § 1283, all after former conviction of a felony. The Honorable Susan Caswell, District Judge, presided at trial. The jury set punishment at fifty (50) years on Counts 1, 3, and 4; life imprisonment with parole on Count 2; and, ten (10) years on Counts 6 and 8. Judgment and Sentence was imposed in accordance with the jury's verdicts on April 25, 2003. Judge Caswell ordered the sentences to be served consecutively. From the Judgment and Sentences imposed, Appellant filed this appeal.

Appellant raises eleven (11) propositions of error:

1. The trial court improperly directed a verdict in this case;

2. A *Batson* violation prevented Appellant from having a fair trial;
3. Felony murder does not arise from the shooting death of a co-felon by a robbery victim during a convenience store robbery;
4. The evidence was insufficient to prove the conspiracy allegations beyond a reasonable doubt;
5. Two counts of conspiracy violate the constitutional prohibition against double jeopardy;
6. There was no evidence that Appellant possessed a firearm at either robbery;
7. Prosecutorial misconduct deprived Appellant of a fair trial;
8. Evidentiary harpoons and other crime evidence deprived Appellant of a fair trial;
9. The trial court erred by failing to sever the counts on two separate robberies;
10. Ineffective assistance of counsel denied Appellant a fair trial; and,
11. Cumulative error deprived Appellant of a fair trial.

After thorough consideration of the entire record before us on appeal, including the original record, transcripts, briefs and exhibits of the parties, we have determined that neither reversal nor modification is required for the reasons set forth below.

The trial court did not improperly direct a verdict. *Cohee v. State*, 1997 OK CR 30, 942 P.2d 211, 215; *Gatlin v. State*, 1976 OK CR 180, ¶ 10, 553 P.2d 204, 206. Proposition One is denied.

The record reflects the prosecutor stated a sufficiently race neutral reason for the excusal of the potential juror. *Bland v. State*, 2000 OK CR 11, ¶

11, 4 P.3d 702, 711, *cert. denied*, 531 U.S. 1099, 121 S.Ct. 832, 148 L.Ed.2d 714 (2001). Proposition Two is denied.

The statutory offense of felony murder applies to the facts of this case, and Appellant was properly charged with and convicted of First Degree Murder. *Kinchion v. State*, 2003 OK CR 28, ¶ 9, 81 P.3d 681. Proposition Three is denied.

In Proposition Four, we find the existence of two conspiracies to commit robbery was clearly supported by evidence that two separate agreements were reached between Appellant and his co-conspirators to rob the convenience stores. *Spuehler v. State*, 1985 OK CR 32, ¶ 7, 709 P.2d 202, 203-204; *Kinchion*, 2003 OK CR 28, ¶ 10, 81 P.3d 681.

Appellant's convictions for two counts of conspiracy do not violate the constitutional prohibition against double jeopardy. *Kinchion*, 2003 OK CR 28, 81 P.3d 681.

We also find Propositions Seven, Eight, Ten and Eleven do not warrant relief. The complained of instances of prosecutorial misconduct were not objected to and our review is for plain error. *Simpson v. State*, 1994 OK CR 40, ¶ 11, 876 P.2d 690, 693. We find no plain error. Further, we find Appellant's complaints of evidentiary harpoons are not supported by the record and the references to threats by the prosecutor were relevant to show Appellant's involvement in the crimes. *Melvin v. State*, 1985 OK CR 111, ¶ 5, 706 P.2d 163, 164; *Powell v. State*, 2000 OK CR 5, ¶ 103, 995 P.2d 510, 533, *cert. denied*, 531 U.S. 935, 121 S.Ct. 321, 148 L.Ed.2d 258 (2000).

We also find Appellant's trial counsel was not ineffective under the standards set forth in *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674 (1984).

No relief is warranted on Appellant's claim of cumulative error because we grant relief on the only error identified (see below).

We also review Proposition Nine for plain error as Appellant did not object to joinder of Counts One and Three. No relief is warranted as joinder of the offenses was proper. 22 O.S.2001, § 438; *Glass v. State*, 1985 OK CR 65, ¶ 9, 701 P.2d 765, 768; *Plunkett v. State*, 1986 OK CR 77, ¶ 7, 719 P.2d 834, 838.

Appellant is entitled to relief on the claim raised in Proposition Six, as there was no evidence that Appellant was in possession of the firearm at either robbery. *Kinchion*, 2003 OK CR 28, ¶ 12, 81 P.3d at 685; 21 O.S.1991, § 1283. Accordingly, Appellant's convictions for two counts of Possession of a Firearm by a Convicted Felon must be reversed and remanded with instructions to dismiss.

DECISION

The Judgment and Sentences imposed in Counts Six and Eight are **REVERSED AND REMANDED WITH INSTRUCTIONS TO DISMISS**. The Judgment and Sentences on all remaining counts are **AFFIRMED**.

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OPINION BY: JOHNSON, P.J.

LILE, V.P.J. : CONCURS
LUMPKIN, J.: CONCURS
CHAPEL, J.: CONCURS IN
PART/DISSENTS IN PART
STRUBHAR, J.: CONCURS

CHAPEL, JUDGE, CONCURS IN PART/DISSENTS IN PART:

I would affirm one Conspiracy count and the Robbery Count along with the sentences of fifty years each. I would reverse the remaining counts. See my dissent in *Kinchion v. State*, 81 P.3d 681 (2003).